Air Conditioning Systems Design Sdn Bhd v Chuah Teong Hooi & Anor (as receiver and managers of the property of Atlas Intek (M) Sdn Bhd)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-603 OF 1995 AND P-02-604 OF 1995
SHAIK DAUD, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
18 AUGUST 1998

Civil Procedure *— Summons for directions — Delay in making application — Plaintiff obtained judgment for price of goods in earlier judgment — Claim for return of same goods — Plaintiff ignored order for early trial and failed to take out summons for directions — Excessive and inordinate delay prejudiced defendants — Whether judge erred in striking out action — Whether plea of res judicata applicable*

The appellant ('plaintiff') filed a claim against the respondents ('defendants') on the ground that they had failed to permit the plaintiff to remove an air-conditioning system and other equipment it had delivered to and installed on the first and second defendants' premises pursuant to other agreements which the plaintiff had entered into. On 18 September 1986, the High Court made an order for priority to be given to the early trial of this action. From 18 September 1986 until 30 August 1994, the plaintiff had ignored the order and failed to take out a summons for directions or any other proceeding in the matter. The defendants contended that the excessive and inordinate delay on the part of the plaintiff in prosecuting this action had prejudicially affected the defendants in that witnesses who would be required for the trial could not be located or could not be located without great difficulty. The plaintiff had given itself an unfair advantage over the defendants to the prejudice of the defendants as the defendants were unable to defend this action appropriately. The defendants then filed an application to dismiss this action for want of prosecution pursuant to O 25 r 1(4) of the Rules of the High Court 1980 ('the RHC') or the inherent jurisdiction of the court. The High Court allowed the defendants' application to strike out the plaintiff's statement of claim for non-prosecution.

Held, dismissing the appeal:

(1) The judge had not erred when he held that the plaintiff, having obtained judgment for the price of the goods in an earlier judgment, could not be allowed to claim again for the return of the same goods. The appellant's submission that the second claim was for the return of the goods and did not contradict the earlier claim had no merit. Further, the judge was correct in applying the principle of res judicata as the matter had been determined with finality between the parties and the plaintiff could not relitigate the matter by raising a further cause of action which had been available to it at inception. All the plaintiff's rights in respect of the goods would have merged in the judgment

and the plea of res judicata would be available to the defendants (see pp 638H–I, 639C–D, I and 640A–B).

(2) Counsel for the appellant did not show how the judge erred in exercising his discretion to strike out the plaintiff's suits on the ground of inordinate delay. The delay had prejudiced the defendants in that material witnesses could not be located or located only with great difficulty. The delay had also given the plaintiff an unfair advantage. Further, the plaintiff had not applied and acted under O 24 for discovery and inspection before taking out a summons under O 25. As such, O 24 r 16 of the RHC had no application in this instance (see pp 640G, I and 641A–B).

[Bahasa Malaysia summary

Perayu ('plaintif') memfailkan tuntutan terhadap penentang-penentang ('defendan-defendan') atas alasan bahawa mereka telah gagal membenarkan plaintif memindahkan sistem penyaman udara dan peralatan lain yang telah dihantar dan dipasang di premis kepunyaan defendan-defendan pertama dan kedua menurut perjanjian-perjanjian lain yang telah diikat oleh plaintif. Pada 18 September 1986, Mahkamah Tinggi membuat perintah supaya keutamaan diberikan kepada pembicaraan awal tindakan ini. Dari 18 September 1986 sehingga 30 Ogos 1994, plaintif telah mengabaikan perintah tersebut dan gagal mendapatkan saman untuk arahan atau apa-apa prosiding lain dalam perkara ini. Defendan-defendan berhujah bahawa kelewatan melampau dan berlebihan pada pihak plaintif dalam pendakwaan tindakan ini telah menjejaskan defendan-defendan dalam ertikata saksi-saksi yang diperlukan untuk perbicaraan tidak dapat dikesan atau tidak dapat dikesan tanpa kesulitan. Plaintif telah memperolehi kelebihan yang tidak wajar ke atas defendan-defendan hinggakan memudaratkan defendan-defendan kerana defendan-defendan tidak dapat membela tindakan ini dengan wajarnya. Defendan-defendan kemudiannya memfailkan satu permohonan untuk membatalkan tindakan ini kerana ketiadaan pendakwaan menurut A 25 k 1(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atau bidang kuasa sedia ada mahkamah. Mahkamah Tinggi telah membenarkan permohonan defendan-defendan untuk membatalkan pernyataan tuntutan plaintif atas sebab tidak ada dakwaan.

Diputuskan, menolak rayuan:

(1) Hakim tidak terkhilaf apabila beliau memutuskan bahawa plaintif, selepas memperolehi penghakiman untuk harga barangan yang berkenaan dalam penghakiman terdahulu, tidak boleh dibenarkan membuat tuntutan semula untuk pengembalian barangan yang sama. Penghujahan perayu bahawa tuntutan kedua adalah untuk pengembalian barangan dan tidak bercanggah dengan tuntutan yang lebih awal tidak mempunyai merit. Seterusnya, hakim adalah

betul dalam memakai prinsip res judicata oleh kerana hal ini telah diputuskan secara muktamad di antara pihak-pihak dan plaintif tidak boleh melitigasikan perkara ini semula dengan membangkitkan kausa tindakan lanjut yang terbuka kepadanya pada peringkat permulaan. Segala hak plaintif berkenaan dengan barangan tersebut sepatutnya tercantum dalam penghakiman dan hujah res judicata boleh digunakan oleh defendan-defendan (lihat ms 638H–I, 639C–D, I dan 640A–B).

(2) Peguam perayu telah tidak menunjukkan bagaimana hakim terkhilaf dalam melaksanakan budi bicaranya untuk membatalkan guaman-guaman plaintif berdasarkan kelewatan yang keterlaluan. Kelewatan ini telah memudaratkan defendan-defendan dalam ertikata bahawa saksi-saksi material tidak boleh dikesan atau tidak boleh dikesan tanpa kesulitan. Kelewatan tersebut juga telah memberikan kelebihan yang tidak wajar kepada plaintif. Selanjutnya, plaintif telah tidak memohon dan bertindak di bawah A 24 untuk penzahiran dan pemeriksaan sebelum mendapatkan saman di bawah A 25. Oleh yang demikian, A 24 k 16 KMT tidak terpakai dalam hal ini (lihat ms 640G, I dan 641A–B).]

[*Editorial note*: The appellant has applied for leave to appeal to the Federal Court vide Application Nos OH–67–98(P) and OH–68–98(P).]

Notes

For a case on delay in making application for summons for directions, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4795.

Case referred to

Henderson v Henderson [1843–60] All ER Rep 378 (refd)

Legislation referred to

Rules of the High Court 1980 O 24 r 16, O 25 r 1(4), O 34 r 2(2)

Appeal from: Civil Suit No 1618 of 1985 (High Court, Pulau Pinang)

Gan Teik Chee (*Gan Teik Chee & Ho*) for the appellant.
Izabella De Silva (*Iza Ng Yeoh & Kit*) for the respondents.

1 October 1998

Shaik Daud JCA: I have read both the judgments of my learned brothers Abu Mansor and Abdul Malek Ahmad JJCA in draft and I agree with their conclusions that both the appeals be dismissed with costs and the deposits to go to the respondents to account of their taxed costs.

18 September 1998

Abu Mansor JCA: The appellants in both suits appeal against our decisions given on 18 August 1998 dismissing with costs both their appeals against the decisions of the learned judge in Pulau Pinang dated 23 August 1995 allowing the defendants' applications in encl 26 to strike out the plaintiff's statement of claim for reason of non-prosecution, also allowing the defendants' application in encl 37 to strike out the plaintiff's statement of claim also for non-prosecution and costs and finally for dismissing the plaintiff's application in encl 43 to strike out the defendants' statement of defence with costs.

We heard substantive arguments of counsel for the appellant and respondents and we came to the conclusion that the appeals were without merit and we held it was trite law that we would not lightly disturb the learned judge's very careful and reasoned judgment in their very complex applications. In both appeals, the learned judge gave one lengthy judgment. Following the learned judge's judgment, we heard both appeals No 13 P–02–603–95 and No 14 P–02–604–95 together with the consent of all parties. Before the start of the appeals, we also granted as prayed in terms of two motions to amend the amended memorandum of appeals with no objection from the respondents. For ease of reference, we will call the appellant as plaintiff and the respondents as defendants.

In order that we may not go into any confusion, we set down here how the learned trial judge treated the various enclosures before him and in respect of which cases. We quote:

> I would like to preface this judgment by stating that the grounds of judgment herein (Suit No 22–1643–1985) are in respect of decisions made on encl 26 in this action and encls 37 and 43 in suit 22–1618–1985 in the High Court in Malaya at Penang between:
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> Airconditioning Systems Design Sdn Bhd ... plaintiff
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> and
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> 1 Chuah Teong Hooi
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> 2 Anthony Geoffrey
>
> (as receivers and managers of the property of Atlas Intek (M) Sdn Bhd) ... defendants
>
> which suit shall hereinafter be referred to as 'the related suit'. Arguments on the said enclosures were, at the request of the parties, taken together, hence this single judgment involving all three enclosures together. Any reference in this judgment to any of these enclosures by itself shall be a reference to that enclosure as specified above.

It may assist the understanding of these appeals as if we give the facts of this case. They are as follows:

On 5 September 1994, the defendants filed an application in encl 26 to dismiss this action for want of prosecution pursuant to O 25 r 1(4) of the Rules of the High Court 1980 ('the RHC') or the inherent jurisdiction of the court. The application was supported by an affidavit at encl 25 affirmed on behalf of the defendants by one Hoh Lee Lee ('Hoh') who was

A in the employ of the third and fourth defendants, the receivers and managers of the first and second defendants.

By Hoh's affidavit, the defendants averred that the plaintiff had filed its claim against them on 27 December 1985 on the ground that they had failed to permit the plaintiff to remove an air-conditioning system and B other equipment ('the goods') it had delivered to and installed on the first and second defendants' premises pursuant to agreements which the plaintiff had entered into with a company called Avtech Construction Sdn Bhd ('Avtech'). The defendants had filed their defence on 18 April 1986.

He further stated that on 18 September 1986, Edgar Joseph Jr J (as his Lordship then was) made an order, inter alia, for priority to be given for C the early trial of this action. On 2 April 1987, a notice of change of solicitors was filed on behalf of the plaintiff, followed by another change to the present solicitors on 12 June 1990. Since 18 September 1986 until the affirming of his affidavit on 30 August 1994, Hoh stated that the plaintiff had ignored the order and failed to take out a summons for directions or D any other proceeding in the matter.

He contended that the excessive and inordinate delay on the part of the plaintiff in prosecuting this action had prejudicially affected the defendants in that witnesses who would be required for the trial could not be located or could not be located without great difficulty, particularly the E former directors or employees of the first and second defendants (which companies had become insolvent) who had previously been involved in what took place and who were named in documents produced by the plaintiff in this action. On the other hand, the directors of the plaintiff were readily at hand to support the plaintiff's case at trial. By delaying the prosecution of this action, the plaintiff had given itself an unfair advantage F over the defendants to the prejudice of the defendants. This was unjust as the defendants were not able to defend this action appropriately as a result thereof. The plaintiff did not have any good reason for the delay or for ignoring the order of the court for the action to be given priority for early trial.

G Hoh further averred that by another order of the court made on 29 September 1986 in the related suit which had also been instituted by the plaintiff in this action, another judge, Mohamed Dzaiddin J (as his Lordship then was), had directed that the related suit be tried at the same time as this action was tried. The plaintiff had similarly failed to prosecute that related suit and the defendants therein had also made an application H to dismiss the same for want of prosecution.

That, essentially, was what was contained in Hoh's affidavit.

In the related suit, the third and fourth defendants in this action were cited as the only two defendants there in their capacity as receivers and managers of a company called Atlas Intek (M) Sdn Bhd. The claim against I the defendants in the related suit was similar to that in this action.

The application by the defendants in encl 37 in the related suit to strike it out for want of prosecution was made pursuant to O 34 r 2(2) of the RHC or the inherent jurisdiction of the court.

The said Hoh again affirmed an affidavit at encl 36, in support of the application at encl 37 in the related suit. The factual averments therein are similar to those in this action except that in the related suit, the plaintiff had filed a summons for directions (encl 26) on 23 January 1987 but had failed to proceed with the hearing of the same or obtain any order thereon. However, on 18 May 1989, the plaintiff, after having changed its solicitors, had filed a further summons for directions (encl 28) and obtained an order on 27 September 1989 directing that the related suit be set down for trial within 60 days thereof. A sealed copy of this order had never been served upon the defendants. However, on 7 August 1992, the plaintiff had served on the defendants a list of documents and an affidavit verifying the list.

Hoh also stated in his affidavit at encl 36 in the related suit that the plaintiff had ignored the two court orders therein and failed to take any steps in the matter since 27 September 1989 by setting down the related suit for trial or otherwise prosecuting it. The same reasons for prejudice to the defendants were advanced as earlier adverted to in relation to this action.

The plaintiff then filed an application at encl 43 in the related suit to strike out the defence for failure to comply with the order of court of 27 September 1989 directing the parties to serve on each other a list of documents and an affidavit verifying the same within 14 days of the order and seeking to enter judgment for the plaintiff pursuant to O 24 r 16 of the RHC.

A director of the plaintiff averred in the related suit that the plaintiff had, on 3 August 1992, complied with this order of the court when its list of documents and the affidavit verifying the list was affirmed, and both were filed. The plaintiff complained that the defendants were guilty of contumelious conduct by not complying with the order of the court dated 27 September 1989 with which it had complied. However, it is to be noted that the plaintiff did not explain how the plaintiff itself was not equally guilty of the same contumelious conduct it complained of when it failed to file the affidavit and list in question within the 14-day timeframe specified in the order of the court and proceeded to file without first applying for and obtaining an order for enlargement of time.

A number of affidavits were filed in both this action and the related suit, with accusations and counter-accusations being levelled by the parties at each other for the delay.

Before us, appellants' counsel Mr Gan Teik Chee in his first ground of appeal contended that the learned judge erred when he held at p 12 of his written judgment that the plaintiff, having obtained judgment for the price of the goods in an earlier judgment, could not be allowed to claim again for the return of the same goods. I quote the fine judgment of the learned judge:

> But what was even more relevant to my mind was the fact that the plaintiff had obtained a final judgment against Avtech on 28 October 1985 (before instituting this action and the related suit) for the price of the same goods in question in suit 22–1282–1985 in the High Court of Malaya at Penang

A wherein the plaintiff had not claimed for the possession or return of the goods, which was an admission that the property in the goods had in fact passed to Avtech and subsequently to the defendants.

In the circumstances, I found myself in agreement with counsel for the defendants who submitted that 'the plaintiff would have been aware that having obtained judgment for the price of the goods, all the rights of the B plaintiff would have merged in the judgment and it would in fact be too late to pursue a claim for the return of the goods from Avtech, let alone the defendants.'

In trying to implify, the appellant's counsel submitted that in the second claim, it was for returning of the goods and this did not contradict the C earlier claim he submitted. He added that the first judgment was for the payment of money due under the contract for installation of the air-conditioning units, the title of them was still reserved in the plaintiff.

When we press learned counsel for the specific provision of the agreement entered between the parties spelling all the details to support D his submission, counsel was unable to do so.

Having considered counsel's submission, we hold, with respect, that there is no merit in the argument of counsel. We find we agree with the finding of the learned judge when he held:

My research showed that 'merger' is defined, inter alia, in the 8th Ed (3rd E impression, 1996) of *Osborn's Concise Law Dictionary* as follows:

'That operation of law which extinguishes a right by reason of its coinciding with another and greater right in the same person, eg a life estate is merged in or swallowed by the reversion when the two interests come into the hands of the same person. A right of action on a simple contract debt is merged in the right of suing on a bond for the same F debt, *and a right of action is merged in a judgment in the sense that no further action may be brought on the debt, but only on the judgment. A special characteristic of the debt, however, such as being a preferential claim in bankruptcy, is not lost merely because judgment is obtained in respect of the debt.*' (Emphasis added)

G As to the appellant's second point, learned counsel submitted that the principle of res judicata in *Henderson v Henderson* [1843–60] All ER Rep 378 should not be applied by the learned judge. Counsel, with respect, proceeded half-heartedly on this point. We think the learned judge had also considered this point very admirably and we quote p 15 of his learned judgments:

H At the time the plaintiff filed the claim against Avtech and obtained a final judgment for the price of the goods which very goods are the subject-matter of this action and the related suit, it elected not to seek the return of the goods, thereby conceding that the title in them had passed to Avtech. Had Avtech not become insolvent and had the plaintiff sought subsequently to bring a further action against Avtech, this time for a declaration that the title I in the goods had not passed to Avtech and consequently for their return to the plaintiff as was being sought to be done in this action and the related suit, this claim would have been met with a plea of res judicata on the ground that the matter had been determined with finality between the

parties and that the plaintiff could not relitigate the matter by raising a further cause of action which had been available to it at inception when it had first filed the claim against Avtech. It therefore follows that neither could the plaintiff raise that cause of action against the defendants in this action and the related suit as all the plaintiff's rights in respect of the goods would have merged in the judgment and the plea of res judicata would be available to the defendants.

As regards the appellant's third ground of appeal, it was also very mute and with due respect to learned counsel, he even conceded that the appellant could not elect to proceed against the defendants on both claims. It is certainly an answer to this appeal, we thought.

The appellant's counsel then came to the crux of the appeal as to why their writ and statement of claim had been struck out on the application of the defendant for reason of non-prosecution and for reason of an inordinate delay.

The appellant's counsel submitted that both the plaintiff and defendants are responsible for the delay. The delay, he said, was because there was negotiation for settlement of the suits outside the court. As regards this allegation, the defendants allege that because of the delay, their position was prejudiced in that many of their witnesses left not because of anything else. They left because the company went into receivership. At p 45 of appeal record is the note of the learned judge recording a complaint by Cik Izabella that her case was prejudiced as a result of the part played by the plaintiff. One Miller, a material witness and all witnesses who played a large part in negotiation leading to the formation of the contract left a few months after judgment was obtained in 22–1282–85. At p 47 of the record of appeal in appeal No 604–1995, it is recorded that Mr Gan Teik Chee representing the plaintiff said that Miller left in 1986 when the suits were not ready for trial. The order for early trial given in September 1986 did not affect Miller.

What was uppermost in our minds was if the appellant had any submission to make, showing how the judge erred in exercising his discretion to strike out the plaintiff's suits on the ground of inordinate delay. With respect, we found this was clearly lacking in the submission of counsel for the appellant. Other than feebly trying to give a reason for the delay, the judge's reason for granting the order prayed by the defence could not in any way be faulted.

It was apparent to us that that the plaintiffs were clearly ordered to have the cases tried on a priority basis by Edgar Joseph Jr J (as he then was) on 18 September 1986 (in encl 26). On 2 April 1987, the plaintiff changed solicitors and followed by another change to the present solicitors on 12 June 1990.

It is also clear that since 18 September 1986 until the filing of the plaintiff's affidavit dated 30 August 1994, as affirmed by Mr Hoh and found as a fact by the learned judge, the plaintiff plainly ignored the order for early trial and failed to take out summons for directions or any proceeding to that effect.

A We fully agree with the submission made by counsel for the respondent Cik Izabella that in this case, delay had prejudiced the defendants in that material witnesses could not and if they could, they could only be located with great difficulty, especially the directors and officers of the first and second defendants. Suffice to say, the delay had also given the plaintiff an unfair advantage.

B Now as far as the related suits were concerned, as stated earlier, Mohamed Dzaiddin J (as he then was) in encl 37 on 29 September 1986 ordered that the related suits be tried at the same time as the others.

We agree with the learned judge when he held that the defendants' application together in the related suit in encl 37 in appeal No 13, be C struck out for want of prosecution under O 34 r 2(2) of the RHC or under the inherent jurisdiction of the court. Hoh affirmed an affidavit (encl 36) in support of encl 37 in the related suit, the facts of which are almost the same except that the plaintiff had filed summons for directions in encl 26 on 23 January 1987 but he failed to proceed or to obtain any order D thereon. On 18 May 1989, the plaintiff, after having changed their solicitors, filed a further summons for directions in encl 28 and obtained an order on 27 September 1989 directing that the suit be set for trial in 60 days. A sealed copy was never served on the defendants. On 7 August 1992, the plaintiff served the defendants a list of documents verifying the list. Hoh said the plaintiff failed to take any steps since 7 September 1989 for trial. E This delay prejudiced the defendants in this case.

In this appeal No 13, the plaintiff also filed encl 43 to strike out the defendants' defence for failure to comply with the 27 September 1989 order directing parties to serve on each other a list of documents within 14 days and seeking to enter judgment pursuant to O 24 r 16 of the RHC. F The defendants averred it is true that plaintiff had so served the list on 7 August 1992 (see para 6 of the affidavit of Hoh dated 30 August 1994 at p 61 of the appeal record). The defendants, however, averred that the plaintiff themselves has also been guilty of delay in not complying with the order dated 28 September 1989, thereby prejudicing the defendants' G position. In reality, the plaintiff had been guilty of delay themselves without applying for extension of time (14 days). Both parties have made submissions to the learned judge and the learned judge eventually held that: (1) the defendants should succeed in their applications in encl 26 and encl 37 in the related action which had the effect of striking out of the plaintiff's action; and (2) the plaintiff should fail in their application in encl 43 to H strike out the defendants' statement of defence in the related action.

We agree that the judge was correct in dealing with encl 43 first. We agree that O 24 r 16 of the RHC had no application in this instant as the plaintiff's failure in the main was to act under O 25 and not O 24. In actual fact, the plaintiff had not applied and acted under O 24 for discovery and I inspection before taking out a summons under O 25. The plaintiff can be dismissed for the same reason. The plaintiff's failure to obey the court's order is the reason for the delay in the case in encl 43 and for that, it should be dismissed with costs. It is also clear that taking encls 26 and 37 in the related action together on the facts as found by the learned judge,

with which we agree, the plaintiff had clearly been guilty of inordinate delay and had not prosecuted expeditiously.

Finally, it remains for us to say that we uphold the learned judge's decision and the reasons therefor. We do find that the learned judge had exercised his discretion on correct principles and had not committed any error. We therefore unanimously dismiss both appeals with costs.

29 September 1998

Abdul Malek Ahmad JCA: I have read the draft judgment of my learned brother Abu Mansor Ali JCA and agree with the conclusion reached that the two appeals ought to be dismissed with costs and the deposits are to go to the respondents to the account of their taxed costs.

The appellant, who was the plaintiff in both the relevant actions below, had sued the respondents, who are the third and fourth defendants in the subsequent suit (Penang High Court Civil Suit No 22–1643–1985), as receivers and managers of the first and second defendants. At the same time, they are also the defendants in the earlier suit (Penang High Court Civil Suit No 22–1618–1985) as receivers and managers of the property of Atlas Intek (M) Sdn Bhd. For the purposes of this judgment, the subsequent suit will be referred to as the first suit and the earlier suit as the second suit.

Only three enclosures, namely encl 26 in the first suit and encls 37 and 43 in the second suit, warrant consideration in these appeals. On 5 September 1994, the respondents in the first suit had filed an application at encl 26 to dismiss the action for want of prosecution pursuant to O 25 r 1(4) of the Rules of the High Court 1980 ('the RHC') or the inherent jurisdiction of the court.

Their supporting affidavit affirmed on 30 August 1994 averred that the appellant had filed their claim on 27 December 1985 on the ground that the respondents had failed to permit the appellant to remove the air-conditioning system and other equipment the appellant had delivered to and installed on the respondents' premises pursuant to agreements between the appellant and Avtech Construction Sdn Bhd ('Avtech'). The respondents' statement of defence was filed on 18 April 1986.

An early trial had been ordered on 18 September 1986. However, no hearing was held and instead there had been two notices of change of solicitors for the appellant on 2 April 1987 and 12 June 1990. In fact, the order for an early hearing had been totally ignored by the appellant as not even the relevant summons for directions had been applied for.

The respondents' contention was that there had been excessive and inordinate delay on the part of the appellant in prosecuting this action and this in turn had prejudicially affected the respondents as their relevant witnesses could not be located or could only be located with great difficulty giving the appellant, whose witnesses were available, an unfair advantage over the respondents.

At the same time, an order had also been made in the second suit on 29 September 1986 for the two actions to be tried together. Since the

A appellant had failed to initiate any action in the second suit, which was in essence similar to the first suit, the respondents there had applied by encl 37 under O 34 r 2(2) of the RHC or pursuant to the inherent jurisdiction of the court to strike it out for want of prosecution.

The only difference between these two applications was that the B appellant had filed a summons for directions on 23 January 1987 in the second suit but had failed to proceed with the hearing. However, on 18 May 1989, the appellant had filed a second summons for directions and obtained an order on 27 September 1989 directing it to be set down for trial within 60 days. The sealed copy of the relevant order was never served on the respondents but the appellant served on the respondents a C list of documents and an affidavit verifying the list on 7 August 1992. Nevertheless, the appellant did not take any action after this which had resulted in the respondents' application in encl 37 in the second suit.

The third application at encl 43 in the second suit was by the appellant to strike out the defence for failure to comply with the court D order dated 27 September 1989 in not serving on the appellant a list of documents and an affidavit verifying the same, within 14 days of the order. The appellant also sought to enter judgment pursuant to O 24 r 16 of the RHC.

The appellant's affidavit in support stated that the appellant had E complied with that same order on 3 August 1992. It must be observed here with some emphasis that the appellant did not at all explain why they had filed the relevant documents outside the 14-day period without first applying for enlargement of time.

The learned trial judge had concluded, as regards encl 26 in the first suit and encl 37 in the second suit, that the appellant had not prosecuted F both actions as expeditiously as they should have, leaving the respondents with no witnesses as the foreign ones had left the country and could not be located with some amount of difficulty after the companies went into receivership and the remaining local director was going to be a hostile witness in view of developments.

G In any event, the learned trial judge was of the view that the appellant had obtained a final judgment against Avtech on 28 October 1985 for the price of the same goods in question which very goods are the subject matter of the first and second suits, which was an admission that the property in the goods had in fact passed to Avtech and consequently to the H respondents. Consequently, it was also the considered opinion of the learned trial judge that the appellant could not raise the cause of action against the respondents in the first and second suits as all the appellant's rights in respect of the goods would have merged in the judgment and the plea of res judicata would have been available to the respondents.

As for encl 43 in the second suit, the learned trial judge held that O 24 I r 16 of the RHC had no application as the breach complained of was a failure by the respondents to comply with an order made on a summons for directions under O 25 and not O 24 of the RHC. He also ruled that the appellant was equally as blameworthy as the respondents in failing to

comply with the order of the court as regards the time frame of 14 days from the date of the order and took the view that the appellant was hoisted by its own petard.

Accordingly, he had allowed encl 26 in the first suit and encl 37 in the second suit and dismissed encl 43 in the second suit with costs. We had considered his well reasoned judgment and the submissions of learned counsel for both the appellant and the respondents before us and found no reason to disagree with the findings of the learned trial judge in both the appeals. This had resulted in us making the orders we made.

Appeal dismissed.

Reported by David Lai